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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

FIRST ENGLISH EVANGELICAL LUTHERAN CHURCH OF GLENDALE, A CALIFORNIA CORPORATION,
Petitioner,

v.

COUNTY OF LOS ANGELES, CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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The National Association of Home Builders has received the parties' written consent to file this brief as *amicus curiae* in support of the petitioner and has filed the letters of consent with the Clerk of this Court.

INTEREST OF THE AMICUS CURIAE

The National Association of Home Builders represents almost 160,000 builder and associate members organized in approximately 850 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Over 7,000 of those members are in California. Its members include not only people and firms that construct and supply single-family homes but also apartment, condominium, commercial and industrial

builders, as well as land developers and remodelors. It is the voice of the American shelter industry.

Together, the industry the National Association of Home Builders represents has built over 1,400,000 housing units in 1989, over 245,000 of which were built in California. In fact, California leads all other states by far in the number of units built, having produced over 17% of the housing units in the entire country.

The Just Compensation Clause and its implementation as a shield against oppressive governmental land use regulation is of paramount importance to the National Association of Home Builders. The actual availability of compensation for the occasional ordinance that results in a taking is critical to the livelihood of private landowners who have lost the beneficial use of their property solely in order to serve local governmental interests, such as in the present case by effectively converting private property into a public flood control channel.[1]

The courts of California, unlike those of virtually every other state and federal jurisdiction that has considered the question, have held, either directly or through procedural mechanisms, that private landowners are not entitled to the just compensation required by the Fifth Amendment (and made applicable to the states by the Fourteenth Amendment) where a local governmental body adopts a land use regulation that takes the landowners' property by depriving it of all, or substantially

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[1] Depending on how the calculation is made, there are somewhere between 162 million and 195 million acres of flood land throughout the United States, approximately 7 million acres of which are located in California. *See A Status Report on the Nation's Floodplain Management Activity (An Interim Report)*, prepared by the Interagency Task Force on Floodplain Management (April, 1989).

all, use. The California courts have taken this position notwithstanding this Court's holding to the contrary in its previous decision in this case, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987).

The National Association of Home Builders was before this Court as an *amicus curiae* on behalf of the petitioner when this case was first brought before this Court. We submit this brief to this Court to resolve the question of whether a court may do indirectly what it may not do directly; that is, whether it may deny a landowner the payment of just compensation by denying the landowner the opportunity to prove that its property has been taken.

SUMMARY OF THE ARGUMENT

The courts of California have a long history, both before and after this Court's initial decision in this case, of limiting the rights of property ownership, requiring landowners to pay more than their fair share of the burdens imposed on all citizens, and denying them just compensation in those situations where a taking has occurred. The latest method of doing this—the one presently before this Court—is to use the stratagem of deciding questions of fact as though they were questions of law and granting judgment in favor of the government without providing the landowner with a trial on the merits.

ARGUMENT

It has long been the position of the courts of California that landowners can be required to provide their property to the public as a *quid pro quo* for the right to obtain governmental permits which would allow de-

velopment of that property. *Ayres v. City Council*, 34 Cal.2d 31, 207 P.2d 1 (1949) (dedication of land to widen a major thoroughfare adjoining the property to be developed). The underlying philosophy was best stated in *Trent Meredith, Inc. v. City of Oxnard*, 114 Cal.App.3d 317, 328, 170 Cal.Rptr. 685, 691 (1981), which upheld the requirement that fees be paid for interim school facilities:

> "The dedication of land or the payment of fees as a condition precedent is voluntary in nature. Even though the developer cannot legally develop without satisfying the condition precedent, he voluntarily decides whether to develop or not to develop. Development is a privilege not a right."

Trent Meredith does not stand alone; similar expressions are common in reported decision. *See, e.g., Russ Building Partnership v. City and County of San Francisco*, 199 Cal.App.3d 1496, 1506, 246 Cal.Rptr. 21, 25 (1987):

> "Developers have been required to pay for streets, sewers, parks and lights as a condition for the privilege of developing a particular parcel."

This view—that development is a privilege—is directly contrary to this Court's holding that development is a right and not a privilege.

> "[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'" *Nollan v. California Coastal Commission*, 483 U.S. 825, 833 n.2 (1987).

The philosophy stated by the foregoing California opinions was accompanied by a determination by the California Supreme Court that just compensation could never be required as a result of a regulatory taking. *Agins v. City of Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372, 589 P.2d 25 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Before *Agins* was decided by the California Supreme Court, the California Courts of Appeal routinely reversed trial court judgments awarding just compensation for inverse condemnation. See, *e.g.*, *Briggs v. State of California ex rel Department of Parks and Recreation*, 98 Cal.3d 190, 159 Cal.Rptr. 390 (1975), *app. dismissed and cert. denied*, 447 U.S. 917 (1980); *Rancho LaCosta v. County of San Diego*, 111 Cal.App.3d 54, 168 Cal.Rptr. 491 (1980), *cert. denied*, 451 U.S. 939 (1981); and *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

Agins, at least in theory, held out the hope that some remedy—even if only invalidation—of a regulation which went too far was available. As a practical matter, no such remedy existed. The remedy was often precluded by procedural decisions. In fact, three of the four California taking cases which came before this Court in the 1980's arose in the context of a demurrer or motion to strike; that is, without any trial on the merits. *Agins v. City of Tiburon, supra; MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340, *reh'g denied*, 478 U.S. 1035 (1986); and the original opinion in the case at bar.[2]

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[2] The dissent in *Agins* in the California Supreme Court took the majority to task for ruling as it did on a demurrer where sufficient facts had been pleaded to state a cause of action.

> "... unless, of course, the majority deemed that they are not bound by the honored rule of law which pre-

The attitude of the courts of California is also demonstrated by their refusal to honor this Court's holding in *Nollan, supra*, which prohibited the "extortion"[3] of easements by the California Coastal Commission. They did this, not by defiantly saying that such easements could be required, but rather by making it impossible for landowners who had been forced to make illegal dedications to recover what they had lost.

Thus, in *California Coastal Commission v. Superior Court*, 210 Cal.App.3d 1488, 258 Cal.Rptr. 567 (1989), and *Rossco Holdings, Inc. v. State of California*, 212 Cal.App.3d 642, 262 Cal.Rptr. 736 (1989), the Courts of Appeal held that a failure to seek administrative review of a permit containing a condition requiring the dedication of an easement barred the landowner from recovering just compensation for the property taken. Compare these mean spirited procedural determinations with that made by the Supreme Court of Florida which has separated litigation involving the judicial review of improper administrative land use decisions from that involving the issue of a taking. See the discussion in *Lake Lucerne Civic Association, Inc. v. Dolphin Stadium Corp.*, 878 F.2d 1360, 1370-1371 (11th Cir. 1989), which sets forth the Florida courts' procedures for first testing the validity of an administrative land use decision and then allowing a second lawsuit for a taking if necessary.

Finally, compare the positions taken by the courts of California in *Nash v. City of Santa Monica*, 37 Cal.3d

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vents the court on a demurrer from finding factual issues contrary to matters well pleaded in the complaint." *Agins, supra*, 24 Cal.3d 266, 280, 117 Cal.Rptr. 372, 380, 598 P.2d 25, 33 [footnote omitted].

[3] *Nollan, supra*, 483 U.S. at 837.

97, 207 Cal.Rptr. 285, 688 P.2d 894 (1984), *app. dismissed*, 470 U.S. 1046 (1985), and *Terminal Plaza Corp. v. City and County of San Francisco*, 177 Cal.App.3d 892, 223 Cal.Rptr. 379 (1986), which held that the owner of residential property had no right to go out of the residential rental business (*Nash*) unless the landowner was willing to provide replacement housing or pay an in lieu fee, with *Seawall Associates v. City of New York*, 74 N.Y.2d 92, 544 N.Y.S.2d 542, 542 N.E.2d 1059 (1989), *cert. denied*, ___ U.S. ___, 110 S.Ct. ___ (Nov. 27, 1989), and *San Telmo Associates v. City of Seattle*, 108 Wash.2d 20, 735 P.2d 673 (1987), both of which held precisely to the contrary.

> "The striking feature of California zoning law is that the courts in that state have quite consistently been far rougher on the property rights of developers than those in any other state. In a fairly long series of cases, the California court has upheld restrictions on property rights which would not be upheld in many other states, and (in some instances) probably not in any other. Moreover, this group of decisions is not an isolated phenomenon, out of line with the rest; the same spirit pervades the body of California zoning law generally . . . [T]he general rule [is] that practically anything goes . . . " 1 Williams, *American Land Planning Law*, section 6.03 at 184-185 (1988 Rev.) [footnote citing six California Supreme Court cases omitted].

This Court's help is needed if landowners in California are to enjoy the Constitutional protection identified by this Court and routinely provided by the federal courts and the courts of the other states.

CONCLUSION

Unfortunately, it is sometimes necessary for superior courts to reinstruct the lower courts that they are required to follow the clear mandate of the Constitution. "Judicial officers," like other state officers, are required to follow this Court's interpretation of the Constitution; it is, after all, the supreme law of the land. *Cooper v. Aaron*, 358 U.S. 1, 18-19 (1958). See also, *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982); 746 F.2d 1437 (11th Cir. 1984); and 883 F.2d 267 (11th Cir. 1987), *reh'g. denied*, 844 F.2d 794 (11th Cir. 1988), where the Court of Appeals was required, three times, to reverse a trial court's determination that unreasonable land use regulation was not to be adequately compensated in damages.

In the case at bar, the only way that the courts of California can be brought into line with this Court's clear statement that the Just Compensation Clause requires the payment of just compensation when the facts warrant them is to grant the petition for certiorari and review the limits which a court may place on a landowner's attempt to recover just compensation when a taking has been alleged.

Respectfully submitted,

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